(1) Supreme Court, U.S.
FILED

No. 01 337 AUG 2 1 2001

OFFICE OF THE CLERK

In The Supreme Court of the United States

ANTHONY TAYLOR,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari to the Pennsylvania Supreme Court

PETITION FOR A WRIT OF CERTIORARI

KATHLEEN A. CRIBBINS
Counsel of Record
134 Harding Road
Pittsburgh, PA 15229
(412) 635-0446

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

53 pp

QUESTIONS PRESENTED

I. WHETHER THE PENNSYLVANIA SUPREME COURT, IN CONFLICT WITH THE DECISIONS OF THIS HONORABLE COURT, ERRED IN RUFUSING TO SUPPRESS THE EVIDENCE, WHERE THE SEARCH OF THE SEPARATE BUSINESS WAS NOT WITHIN THE SCOPE OF THE SEARCH WARRANT, WAS NOT A VALID PROTECTIVE SWEEP, WHERE THERE WAS NO REASONABLE ARTICULABLE SUSPICION TO BELIEVE THAT PETITIONER TAYLOR WAS ARMED AND WHERE AN APPLICATION OF THE "PLAIN FEEL" DOCTRINE WOULD NOT SUPPORT THE SEARCH OF PETITIONER TAYLOR.

PARTIES TO THE PROCEEDING

Petitioner

Anthony Taylor

Respondent

Commonwealth of Pennsylvania

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PRECEEDING ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 4

CONCLUSION 9

APPENDIX 10

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION,
AMENDMENT IV

MARYLAND V. BUIE, 494 U.S. 325 (1990) 8

MARYLAND V. GARRISON, 480 U.S. 791107
S. Ct. 1013 (1987) 7

TERRY V. OHIO, 392 U.S.1, 88 S.Ct. 1868 (1968) 8

WONG SUN V. UNITED STATES, 371 U.S.
471, 83 S.Ct. 407 (1963) 8

OPINIONS BELOW

The opinion and order of the Supreme Court of Pennsylvania was announced on May 23, 2001. A copy of the opinion is included in the Appendix at Appendix page 1. The opinion and order of the Pennsylvania Superior Court was filed on October 31, 1997. A copy of the opinion is included in the Appendix at Appendix page 20. The opinion of the Court of Common Pleas of Allegheny County was filed on February 5, 1997. A copy of the opinion is included in the Appendix at Appendix page 31.

JURISDICTION

This Petition for Writ of Certiorari is filed within 90 days of the decision of the Pennsylvania Supreme Court on May 23, 2001. This Honorable Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Petitioner Anthony Taylor was charged by Criminal Information filed on March 22, 1995 at No. CC9502985 in the Court of Common Pleas of Allegheny County, Pennsylvania with one(1) count of Possession With Intent to Deliver Controlled Substance, Drug, Device or Cosmetic (35 P.S. §780-113(a)(30)) (heroin); one(1) count of Possession With Intent to Deliver Controlled Substance, Drug, Device or Cosmetic (35 P.S. §7870-113(a)(30)) (cocaine); one(1) count of Possession Controlled Substance, Drug, Device or Cosmetic (35 P.S. §780-113(a)(16)) (heroin); one(1) count of Possession Controlled Substance, Drug, Device or Cosmetic (35 P.S. §780-113(a)(16)) (cocaine); one(1) count of Possession or Distribution of Small Amount (35 P.S. §780-113(a)(31)) (marijuana).

On December 18, 1996, the trial court entered an Order of Court granting Mr. Taylor's written suppression motion.

The facts of the criminal incident as found by the trial court in its opinion are as follows:

> The Duquesne Police Department had received numerous complaints about drug trafficking activity taking place at the G-Service Convenience Store located at 418 Crawford Avenue in Duquesne, Pennsylvania. In response to those complaints, a surveillance officer was sent to that location to observe the activity at or near the store. On December 13, 1994 and January 4, 1995, that officer maintained surveillance of the store for more than three hours and recorded his observations concerning the patrons who visited the establishment and the length of time that they were in the store. Based upon the number of people and the length of time that they had spent in the store, an affidavit of probable cause was completed and submitted tot he local district magistrate requesting that search warrants be issues for the G-Service Convenience Store and the residence of that store's proprietor, Eric Gooden, (hereinafter referred to as "Gooden").On January 20, 1995, search warrants were obtained for these two locations and the police effectuated those searches. It is the search of the G-Service

Convenience Store which is the subject of the current appeals. The arresting police officers went into the G-Service Convenience Store and searched the premises finding Gooden and a significant quantity of crack cocaine behind the counter. Having found this contraband, two of the members of the search team were directed to go down the steps of his building into another area and continue the search. In the basement of this building, a barbershop business was being conducted. That business had two barber chairs and all of the necessary equipment one would expect to find in a barbershop.

When the officers entered this barbershop, the observed Anthony Taylor, (hereinafter referred to as "Taylor"), seated in a barber's chair with a black plastic apron covering his torso, getting a hair cut from John Mahone, Jr., (hereinafter referred to as "Mahone"). One of the officers, Richard Scott Adams, announced that they were police officers conducting search for drugs. Officer Adams testified that he observed Taylor's hands moving under the apron and he removed Taylor's apron and decided to search Taylor's pocket which was subsequently removed and that object, a plastic prescription bottle, appeared to contain crack cocaine. Once Taylor was searched and handcuffed,

> Officer Adams then instructed a fellow officer to search the two coats that were hanging in on the coat rack. These coats belonged to Mahone and Taylor and the searches of these coats revealed that Taylor had additional pieces of crack in his coat and Mahone had several baggies containing marijuana. The results of these searches, both upstairs and downstairs, provided the predicate for the criminal prosecutions filed against Mahone, Taylor and Gooden.

(Opinion of the trial court at Appendix page 33).

The Commonwealth of Pennsylvania timely filed a consolidated appeal to the Superior Court of Pennsylvania and on October 31, 1997, the Superior Court panel vacated the order of the trial court. On May 23, 2001, the Supreme Court of Pennsylvania affirmed the order of the Superior Court.

REASONS FOR GRANTING THE PETITION

The case presents an issue which Petitioner believes should be addressed by this Honorable Court. The decision of the Supreme Court of Pennsylvania to affirm the order of the Superior Court of Pennsylvania was contrary to established case law as the search of the separate business was not within the scope of the search warrant or a valid protective sweep, there was no reasonable articulable suspicion to support the notion that Petitioner Taylor was armed and an application of the "plain feel" doctrine would not support the search of Taylor.

In the present case, police officers executed a search warrant which authorized a search of a convenience store, located at 418 Crawford Avenue, in the Duquesne section of Allegheny County as well as the proprietor of the store, Eric Gooden. The police had information that drugs were being sold out of the store and had made one controlled buy of crack cocaine from the store. Upon executing the warrant on the first floor of the store, the police found a quantity of crack cocaine. They immediately arrested Eric Gooden. After arresting Gooden, officer then went into a separate business, a barbershop, where they confronted two men. One of the men, Anthony Taylor, was sitting in a barber chair getting his hair cut by another man, John Mahone. The officers patted Taylor down, felt a hard object in his pant pockets which did not feel like a knife or gun, and removed it and discovered a large vial.

The Trial Court suppressed all evidence, ruling that the officers had no right to go into the separate business on another floor.

In the present case, officers secured a search warrant to search the following:

> Person of Eric Gooden-B/M-Age 29-Dark Skinned 418 Crawford Avenue Duquesne PA 15110 – Corner of Crawford & 5th Street – 2 store White Brick. A white sign is above the entrance labeled (sic) "G-Service Convenience Store[“] & 2 phone numbers 466-1071 and 466-1061 painted in red (also a picture of a car on the sign)

The affidavit in support of the application for search warrant laid out the circumstances of the surveillance of the convenience store and of a controlled "buy" there.

As a result of the aforementioned surveillance and controlled buy, the search warrant was issued for the G-Service Convenience Store and the person of Eric Gooden.

When the officers descended the stairs to the separate business, they discovered Mr. Taylor sitting in a barber chair getting a haircut from Mr. Mahone. Mr. Taylor was wearing a black barbering apron. Chief Adams of the Duquesne Police testified that he believed that there was only one entrance and one exit to the building but that he wasn't sure if the basement had a separate exit. Thus, one way to enter the separate business basement barbering area was by walking down the stairs off the main entrance to the building.

In its ruling that the evidence should be suppressed, the trial court found that the "G" Service Convenience Store was a separate establishment, from the barbering business, and thus a search warrant for the convenience store would not authorize a search of the barbershop. In making its finding of fact, the trial court established definitively that the "G" Service Convenience Store was not a part of the barbering establishment.

In the present case, there were plenty of tipoffs to alert the officers to the fact that the basement barbershop business was being used as a separate business premise. It is noteworthy, as was found by the trial court, that it was a distinct facility from the convenience store, with two barber chairs, barbering equipment and that it contained an individual getting a haircut from another individual who was administering a haircut as police entered. One does not encounter such things in a convenience store.

In Maryland v. Garrison, 107 S. Ct. 1013 (1987) this Honorable Court established the standard for searches akin to the search in the case at bar as follows:

> The question whether the execution of the warrant violated respondent's constitutional right to be secure in his home is somewhat less clear. We have no difficulty concluding that the officers' entry into the third-floor common area was legal; they carried a warrant for those premises, and they were accompanied by McWebb, who provided the key that they used to open the door giving access to the third floor common area. If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obliged to limit their search to McWebb's apartment. Moreover, as the officers recognized, they were required to discontinue the search of respondent's apartment as soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant.

Garrison, supra, 1017-1018

In the present case, as indicated, there were a plethora of items to indicate that the convenience store and the barbershop were distinct stores where entirely different services were available.

Further, there were no reasonable, articulable facts to establish that any adjacent area harbored individuals who posed any danger. Maryland v. Buie, 494 U.S. 325 (1990)

Once in the barbershop, the officers in question were able to observe Anthony Taylor sitting in a barber chair covered with an apron and Mr. Mahone cutting Anthony Taylor's hair. The officer conducted a pat-down and felt, in Mr. Taylor's pocket, a hard object which did not feel like a gun or a knife. This search of Mr. Taylor was improper.

Assuming arguendo that reasonable suspicion was aroused, the officer would have been authorized to conduct a carefully limited search of the outer clothing of Mr. Taylor in an attempt to discover weapons which may have been used against him. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). Because the "sole justification of the search ... is the protection of the police officer and others nearby ... it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." Terry v. Ohio, supra, 392 U.S. at 29, 88 S.Ct. at 1884.

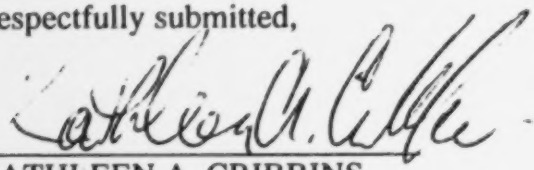
The officer was unable to testify that the bulge felt like a specific weapon. Furthermore, he never indicated that he perceived what he felt to be contraband. Given the lack of evidence that the officer reached into Mr. Taylor's pocket because he feared Mr. Taylor had a weapon or drugs, the search exceeded the bounds of a Terry search in violation of Mr. Taylor's constitutional rights. Because the search of Mr. Taylor was illegal, the fruits that arose therefrom, could properly be suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963).

CONCLUSION

WHEREFORE, Petitioner Anthony Taylor respectfully requests that his Petition for Writ of Certiorari be granted.

This is the 21st day of August, 2001.

Respectfully submitted,



KATHLEEN A. CRIBBINS
PA I.D. #41109
134 Harding Road
Pittsburgh, PA 15229
Telephone: (412) 635-0446

APPENDIX

APPENDIX

Opinion of the Pennsylvania
Supreme Court (May 23, 2001) 1

Opinion of the Pennsylvania
Superior Court (October 31, 1997) 20

Opinion of Court of Common Pleas
Of Allegheny County (February 5, 1996)..... 31

(J-130A/B-1999)
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 34 W.D. Appeal Docket 1999
Appellee	:	Appeal from the Order of the Superior Court entered October 31, 1997 at No. 52 PGH 1997, reversing the Order of the Court of Common Pleas of Allegheny County entered December 18, 1996 at No. CC 9502985
v.	:	
ANTHONY TAYLOR	:	
Appellant	:	ARGUED: September 14, 1999
COMMONWEALTH OF PENNSYLVANIA	:	No. 80 W.D. Appeal Docket 1998
Appellee	:	Appeal from the Order of the Superior Court entered October 31, 1997 at No. 53 PGH 1997, reversing the Order of the Court of Common Pleas of Allegheny County entered December 18,
v.	:	
JOHN MAHONE, JR.	:	
Appellant	:	

: 1996 at No. CC
: 9516023
:
: ARGUED: September
: 14, 1999

OPINION ANNOUNCING JUDGEMENT OF COURT

MADAME JUSTICE NEWMAN **DECIDED: MAY 23, 2001**

Anthony Taylor (Taylor) and John Mahone (Mahone) appeal from the Superior Court's Order, which reversed the suppression of evidence seized during the execution of a search warrant for a convenience store. The present consolidated appeal questions whether the searches conducted in the basement of the convenience store and the subsequent seizures of evidence violate the Fourth Amendment to the United States Constitution. Because we disagree with portions of the Superior Court's decision, we affirm the order of the Superior Court in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

The Duquesne Police Department received numerous complaints about drug trafficking activity in the G-Service Convenience Store at 418 Crawford Avenue, in Duquesne, Pennsylvania. In response to the complaints, the police set up surveillance outside the store. On December 13, 1994 and January 4, 1995, the surveillance officer noted the patrons who visited the store and the short length of time many of those patrons spent inside the store. Several weeks later, the police sent a confidential informant into the store to make a controlled buy. The informant returned with crack

cocaine that he had purchased from Eric Gooden, the owner of the G-Service Convenience Store.

Based upon the information gathered from the surveillance and the informant's controlled buy, the police obtained a search warrant authorizing a search of the G-Service Convenience Store. On January 20, 1995, a search team effectuated the warrant. Inside the store, the police found Gooden and a large quantity of crack cocaine behind a counter. While part of the search team remained with Gooden, two officers went down a set of stairs and into the basement of the building.

In the basement, the officers encountered Taylor, sitting in a barber's chair and wearing a black plastic apron over his torso. The police observed Mahone cutting Taylor's hair. The basement contained one other barber's chair and some hair-cutting equipment.

After the officers announced their presence, Officer Richard Scott Adams (Officer Adams) noticed Taylor's hands moving underneath the plastic apron. Fearing that Taylor could be reaching for a weapon, Officer Adams removed the apron and patted the exterior [J-130A/B-1999] – 2 of Taylor's pocket. Officer Adams felt a hard object and removed it from Taylor's pocket. The object was a plastic prescription bottle, which appeared to contain crack cocaine.

After arresting Taylor and placing him in handcuffs, Officer Adams searched Mahone. Officer Adams did not find anything incriminating on Mahone. Then, Officer Adams handcuffed Mahone, while Constable Gordon McIntyre (Constable McIntyre) searched two coats, which were draped on a chair ten feet from Taylor and Mahone. Constable McIntyre discovered additional pieces of crack in Taylor's coat and several baggies containing marijuana in Mahone's coat.

The police charged both Taylor and Mahone with possession of a controlled substance [1] and possession of a

[1] The Controlled Substance, Drug, Device and Cosmetic Act, Act of April 14, 1972, P.L. 233, as amended, 35 P.S. § 780-113(a)(16).

controlled substance with intent to deliver.[2] Both men filed motions to suppress the evidence seized from them, which the suppression court granted. The court held that, while the warrant for the search of the convenience store had been valid, the searches of Taylor and Mahone had exceeded the scope of the warrant.

The Commonwealth certified in good faith that the suppression of the evidence terminated or substantially handicapped its prosecution, and appealed to the Superior Court. See 42 Pa.C.S. § 934; Pa.R.A.P. 311(d). In a fragmented memorandum opinion, the Superior Court reversed the suppression of the evidence. Writing for the court, Judge, now Justice, Saylor concluded that the search of the basement barbershop had been outside the scope of the warrant, however, the search could be justified as a legitimate protective sweep of the premises in conjunction with the arrest of Gooden. Judge Olszewski filed a concurring opinion in which he disagreed that the search of the basement could be justified as a protective sweep. In his view, the search of the basement had been [J-130A/B-1999] – 3 lawful because the barbershop is open to the public, and therefore Taylor and Mahone did not have a reasonable expectation of privacy in the basement. Judge Popovich dissented and stated that he could have affirmed based on the reasoning of the suppression court. We granted Petitions for Allowance of Appeal filed by Taylor and Mahone to consider whether the searches conducted in the basement were beyond the scope of the warrant, and if so, whether such searches were reasonable under the Fourth Amendment.

DISCUSSION

When the Commonwealth appeals an order suppressing evidence, we apply the following standard of review:

> [W]e consider only the evidence of the defendant's witnesses and the evidence of the prosecution that, when

[2] 35 P.S. § 780-113(a)(30).

> read in the context of the entire record, remains uncontradicted. We are bound by the [suppression] court's findings of fact if they are supported by the record, but we must examine any legal conclusions drawn form those facts.

Commonwealth v. Pickron, 634 A.2d 1093, 1096 (Pa. 1993). With this standard in mind, we will first examine whether the searches conducted in the basement were within the scope of the search warrant.

Scope of the Warrant

Both lower courts found that the search of the basement of the convenience store fell outside the scope of the warrant. The Superior Court concluded that because Gooden and the G-Service Convenience Store, not the basement, were the targets of the police investigation, the search of the basement exceeded the scope of the warrant. Super. Ct. Op., at 5. Thus, the Superior court agreed with the suppression court that prior to the execution of the warrant and the entry into the building by the police, the Duquesne Police Department lacked probable cause to search the basement. We agree. [J-130A/B-1999] - 4

The Warrant Clause of the Fourth Amendment to the United States Constitution prohibits the issuance of any warrant unless based upon "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend IV. The scope of a lawful search pursuant to a warrant is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." Maryland v. Garrison, 480 U.S. 79, 84 (1987); Commonwealth v. Kiessling, 552 A.2d 270, 272 (Pa. Super. 1988), allocatur denied, 562 A.2d 825 (Pa. 1989).

In the present case, the police possessed a valid warrant to search the G-Service Convenience Store. The warrant described the place to be searched as:

> 418 Crawford Ave[.] Duquesne[,] PA 15110 - - Corner of Crawford & 5th Street-2 story White Brick. A white sign is above the entrance labled (sic) "G-Service Convenience Store[“] & 2 phone numbers 466-1071 and 466-1061 painted in red (also a picture of a car on the sign)[.]

Search Warrant (R.R. 17a). The affidavit of probable cause repeatedly emphasized that the investigation and surveillance focused on the G-Service Convenience Store and did not mention the basement barbershop. Application for Search Warrant and Affidavit of Probable Cause)R.R. 17a-19a). While the barbershop was located in the same building as the convenience store, the suppression court found the barbershop to be a separate and distinct facility from the convenience store. The record, which contains evidence that the basement housed only barbershop equipment and activity, sufficiently supports the finding of the suppression court. Because the barbershop existed as a separate facility from the convenience store and the police did not have probable cause to believe that drug activity had occurred in the barbershop, the basement barbershop fell outside the scope of the warrant issued to search the convenience store.
[J-130A/B-1999] – 5

Protective Sweep

While the search of the basement extended beyond the scope of the warrant, this search may nonetheless be justified under the Fourth Amendment. The Commonwealth asserts, and the Superior Court agreed, that the police entered the basement as part of a legitimate protective sweep. The Superior Court noted that while it is unclear from the record whether there was a door that physically separated the first floor of the convenience store from the basement, the record did show that persons entering the store could pass freely between the first floor and the basement. Given the

possibility that the police may have reasonably believed that other individuals were on the premises who could threaten the officers' safety, the Superior Court found that the officers properly conducted a protective sweep of the basement after arresting Gooden. We agree.

Not every search must be conducted pursuant to a warrant, for the Fourth Amendment bars only unreasonable searches and seizures. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995). While a search is generally not reasonable unless executed pursuant to a warrant, the Supreme Court of the United States and this Court have recognized exceptions to the warrant requirement. See, e.g., Colorado v. Bertine, 479 U.S. 367, 371-72 (1987) (inventory search); New York v. Burger, 482 U.S. 691, 701-703 (1987) (administrative search of a closely regulated business); Terry v. Ohio, 392 U.S. 1, 27 (1968) (pat-down frisk); Commonwealth v. Miller, 724 A.2d 895, 900 (Pa. 1999), cert. denied, ____ U.S. ____, 120 S.Ct. 242 (1999) (emergency situation); Commonwealth v. Morris, 644 A.2d 721, 723-24 (Pa. 1994), cert. denied, 513 U.S. 1031, (1994) (protective search). One well-recognized exception to the warrant requirement is the protective sweep.

A protective sweep is "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." Maryland v. Buie, 494 U.S. 325, 327 (1990). Buie sets forth two levels of protective sweeps. Id. At 334. The two levels are defined thus: [J-130A/B-1999] – 6

> [A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those

> facts, would warrant a reasonable prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Id. Pursuant to the first level of a protective sweep, without a showing of even reasonable suspicion, police officers may make cursory visual inspections of spaces immediately adjacent to the arrest scene, which could conceal an assailant. The scope of the second level permits a search for attackers further away from the place of arrest, provided that the officer who conducted the sweep can articulate specific facts to justify a reasonable fear for the safety of himself and others.

We have recognized the exigency created by the existence of hidden third parties during an arrest. See Commonwealth v. Norris, 446 A.2d 246, 249 (Pa. 1982). In Norris, we upheld, as a search incident to an arrest, an inspection of a bedroom that resulted in the discovery of a knife visible in plain view. Id. In light of Buie, this "search" is best designated anew as a protective sweep because the goal was to protect the officers in Norris from third parties.

In Norris, the police conducted a warrantless arrest of a suspect wanted for the rape of a young girl at knifepoint. After the police detained the suspect in the living room of the apartment, two officers swept through his bedroom and seized a knife in plain view. As justification for the protective sweep, we found that "the police had every reason to believe a firearm was available to the occupants of the apartment and that one of its usual occupants, appellant's brother, whom appellant had implicated in his threats of harm to the victim, was unaccounted for in the living room." 446 A.2d at 249. We held that, incident [J-130A/B-1999] - 7 to the arrest, the police had authority for the purpose of ensuring their own safety to enter other areas from where they might anticipate danger.[3] Id. At 250.

---

[3] Norris, supra, is devoid of facts to indicate the exact proximity of the bedroom to the living room.

Like the officers in Norris, the officers in the present case conducted a valid protective sweep. To decide whether the facts justified a protective sweep, the reviewing court must consider all of the facts objectively and from the position of the reasonably prudent police officer. Buie, 494 U.S. at 327. Because the sweep in the present case extended beyond the area within the immediate vicinity of the arrest, there must be "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonable prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id. T 334.

Based on the facts in the record and the inferences taken from them, we conclude that the police carried out a proper protective sweep. Officer Adams, one of the two police officers involved in the sweep, testified that a few minutes before he went into the building, he had observed both Taylor and Mahone enter the convenience store on the first floor. N.T. 12/18/96 (Suppression Hearing), at 67-68 (R.R. 86a-87a). Chief Richard Stevens Adams (Chief Adams) recalled that he observed four people in the first floor when the police entered the building; neither Taylor nor Mahone was one of the visible people. N.T. 12/18/96 (Suppression Hearing), at 42-43 (R.R. 61a). The concern for the safety of the officers was best expressed by Officer Adams who testified that, when he saw that the other officers were with Gooden, his "first instinct was to go downstairs to secure that area down there." N.T. 12'18/96 (Suppression Hearing), at 75 (R.R. 94a). None of the officers recalled any door separating the first floor and the basement. See N.T. 12/18/96 (Suppression Hearing), at 56, 69, 79 (R.R. 75a, 88a, 98a), and Chief Adams stated [J-130A/B-1999] - 8 undeniably that the only access to the first floor was from the front door and the basement. N.T. 12/18/96 (Suppression Hearing), at 56 (R.R. 75a). At the direction of one of the officers, Officer Adams and Constable McIntyre proceeded down the steps of the basement.

Clearly, there are specific and articulable facts, which "When taken together with the rational inferences from those facts," would give the police reasonable concerns for their safety. Here, after extensive surveillance and probable cause of illegal activity, the police entered a building to search for narcotics. Once inside the convenience store, the police apprehended Gooden and located a large quantity of a controlled substance but could not confirm the whereabouts of two individuals who had just entered. As the only accessible area adjoining the first floor, the basement provided a logical hiding place for Taylor and Mahone. The police entered the basement under a reasonable belief that third parties were present and could pose a threat to them, therefore exigent circumstances legally justified the protective sweep of the basement.

Because the scope of a protective sweep extends only to a visual inspection of those places in which a person might be hiding and lasts no longer than is necessary to dispel the fear of danger, Buie 494 U.S. at 335, Commonwealth v. Crouse, 729 A.2d 588, 592 (Pa. Supra. 1999), allocatur denied 747 A.2d 364 (Pa. 1999), we address the validity of the searches of Taylor and the two coats.

Search of Taylor

The Superior Court held that once the police officers entered the basement, they were justified in searching Taylor for a potential weapon. Because Taylor began moving his hands under the barber's apron, the court concluded that the officer could have reasonably suspected that Taylor might be armed and dangerous. We agree.

A police officer may conduct a quick frisk for weapons if he or she reasonably fears that the person wit whom he or she is dealing may be armed and dangerous. Terry v. [J-130A/B-1999] – 16 Ohio, 392 U.S. 1, 27 (1968); Commonwealth v. Hicks, 253 A.2d 276, 279 (Pa. 1969). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonable

prudent man in the circumstances would be warranted in the belief that his safety or the safety of others was in danger." Terry, 392 U.S. at 27. The existence of reasonable suspicion to frisk an individual must be judged in light of the totality of the circumstances confronting the police officer. United States v. Cortez, 449 U.S. 411, 418 (1981); In the interest of D.M., 727 A.2d 556, 557 (Pa. 1999).

In light of the totality of the circumstances in the instant case, Officer Adams reasonably suspected that Taylor could be armed and dangerous. Officer Adams and Constable McIntyre discovered Taylor and Mahone while conducting a protective sweep subsequent to the arrest of Gooden and the discovery of a large quantity of crack cocaine. After announcing their presence, the officers told Taylor and Mahone not to move. N.T. 12/18/96 (Suppression Hearing), at 61 (R.R. 80a). Taylor fumbled under the black barber's apron and reached for his pocket. N.T. 12/18/96 (Suppression Hearing), at 62 (R.R. 81a). To protect his safety and the safety of the other individuals in the basement, Officer Adams justifiably touched Taylor's pocket to determine if Taylor had a weapon.

Taylor argues that even if the pat-down of his outer-clothing was reasonable, Officer Adams had no basis for removing the pill bottle from Taylor's pocket. Because Officer Adams knew that Taylor did not possess a weapon and could not be certain that the bottle was contraband, Taylor maintains that this evidence should be suppressed. The Superior Court concluded that Officer Adams felt what he reasonably believed to be a weapon in Taylor's pocket, therefore, Officer Adams justifiably reached into Taylor's pocket. We agree with the Superior Court and find the seizure of the pill bottle to be constitutional. [J-130A/B-1999] – 10 As noted above, the purpose of a frisk under Terry is to discover evidence, but to allow the officer to pursue his investigation without fear for his or her safety. See Adams v. Williams, 407 U.S. 143, 146 (Pa. 1972); Commonwealth v. E. M., 735 A.2d 654, 661, (Pa. 1999). In keeping with that purpose, the scope of a Terry frisk is

limited to that which is necessary for the discovery of weapons. Terry, 392 U.S. at 26; Commonwealth v. Stevenson, 744 A.2d 1261, 1264 (Pa. 2000). Therefore, in order to reach into a suspect's pocket during a frisk, the officer would have to feel something that reasonably appears to be a weapon.[4]

We dealt with the search of a defendant's pocket and the seizure of a bottle in Commonwealth v. Graham. See 721 A.2d 1075 (Pa. 1998). In Graham, Officer Dawley had been on patrol alone, late at night, when he confronted three individuals. In order to effectuate an arrest of one of the individuals, Officer Dawley had to turn his back on the defendant, whom Officer Dawley noticed had a bulge in the front pocket of his pants. Officer Dawley patted the bulge and concluded that it was money. Then, Office Dawley patted the defendant's back pockets and felt what he believed to be a Lifesavers Holes bottle. Officer Dawley shined a flashlight down into the pocket and discovered a Lifesavers Holes container full of crack cocaine.

In examining the search of the defendant, we concluded that Officer Dawley had been reasonable in initiating a frisk of the defendant for weapons. Graham, 721 A.2d at 1077. This Court went on to find that Officer Dawley had exceeded the scope of a valid warrant. [J-130A/B-1999] – 11

---

[4] We need not analyze whether the officer justifiably put his hand into Taylor's pocket under the "plain feel exception." Under the "plain feel exception," an officer may confiscate a non-threatening object if it becomes immediately apparent that it is contraband during a legitimate Terry frisk. Minnesota v. Dickerson, 508 U.S. 366, 375-76 (1993). In the present case, Officer Adams reached into Appellant Taylor's pocket under the reasonable belief that the hard object in Taylor's pocket was a weapon, and not contraband. Therefore, we utilize the principles of Terry and not those of Dickerson to analyze the validity of this search.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	No. 34 W.D. Appeal Docket 1999
Appellee	:	Appeal from the Order of the Superior Court entered October 31, 1997 at No. 52 PGH 1997, reversing the
v.	:	Order of the Court of Common Pleas of Allegheny County entered December 18,
ANTHONY TAYLOR	:	1996 at No. CC 9502985
Appellant	:	ARGUED: September 14, 1999
COMMONWEALTH OF PENNSYLVANIA	:	No. 80 W.D. Appeal Docket 1998
Appellee	:	Appeal from the Order of the Superior Court
v.	:	entered October 31, 1997 at No. 53 PGH
JOHN MAHONE, JR.	:	1997, reversing the Order of the Court of
Appellant	:	Common Pleas of
	:	Allegheny County

: entered December 18,
: 1996 at No. CC
: 9516023
:
: ARGUED: September
: 14, 1999

CONCURRING AND DISSENTING OPINION

MR. JUSTICE NIGRO **DECIDED: May 23, 2001**

I agree with the opinion announcing the judgment of the court ("opinion of judgment") that the search of the basement exceeded the scope of the warrant for the G-Service Convenience Store. Unlike the opinion of judgment, however, I do not believe that the search of the basement was justified as a legitimate protective sweep and therefore, I must also respectfully dissent.

[J-130A/B-1999]

The government bears a heavy burden of proving that a warrantless search was constitutional. United States v. Jeffers, 342 U.S. 48, 51 (1951); United States v. Brightwell, 563 F.2d 569, 574 (3rd Cir. 1977). As the opinion of judgment notes, in Maryland v. Buie, 494 U.S. 325 (1990), the United States Supreme Court held that an arresting officer may only conduct a warrantless protective sweep of areas beyond the immediate scene of an arrest if the officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably justify the officer in believing that the areas harbor an individual posing a danger to the officer or others. Id. At 327.[1] "[W]hile officers need not have probable cause to believe a dangerous third person is present, the mere possibility of such a presence is not enough [to justify a protective sweep]. Instead, police must

[1] This is the standard for a second level search as described by the opinion of judgment.

have specific and articulable grounds sufficient to support a reasonable belief that a person posing a danger is present." Hayes v. Nevada, 106 Nev. 543, 551, 797 P.2d 962, 967-69 (1990). Blanket sweep searches of premises following the arrest of someone inside the premises are patently unconstitutional. Thus, courts reviewing suppression motions must carefully review the reasons given by police officers for conducting protective sweeps so that officers do not engage in warrantless sweep searches as a pretext for substantive searches. See id. 797 P.2d at 967-69; United States v. Colbert, 76 F.3d 773, 778 (6th Cir. 1996) (allowing police to conduct a protective sweep because they do not know whether or not another person may be in the home not only creates an incentive for police to remain ignorant of who is in the home in order to be able to conduct a protective sweep, but also is contrary to the requirement in Buie that the police have an articulable basis to support their reasonable suspicion of danger in the areas to be swept).

[J-130A/B-1999]

In my view, the Commonwealth failed to present specific and articulable facts in the instant case that demonstrate that the police officers reasonably believed that there were individuals in the basement who posed a danger to them.[2] I also agree with Judge Olszewski's concurring

---

[2] The opinion of judgement picks out a few isolated statements made by various Commonwealth witnesses and concludes that based on these statements, the officers involved in the search of the convenience store must have feared that dangerous third parties were located in the basement. However, none of the Commonwealth's witnesses testified that they suspected potentially dangerous third parties in the basement. Rather, the Commonwealth's witnesses explained that they entered the basement simply because it was easily accessible to the convenience store. Moreover, in its argument to this Court, the Commonwealth does not rely on the witnesses' statements cited by the opinion of judgment but rather, only argues that the search was a legitimate protective sweep due to the possibility that other individuals may have been present in the basement because of its accessibility from the convenience store. Thus, based on my reading of the record and the argument framed by the Commonwealth, I disagree with the opinion of judgment that the Commonwealth presented the specific and articulable facts necessary to

opinion that no such reasons are present in the record. See Super. Ct. Op. At 2 (Olszewski, J., concurring) (nothing in suppression court's findings indicates that following arrest of Gooden, the officers had reasonable fear of a threat to their well-being). The opinion of judgment notes that Officer Adams testified that his first instinct was to go downstairs in order to secure the basement. However, Officer Adam never articulated why he felt the need to secure the basement, much less offered any specific facts as to why he reasonably believed there were persons present in the basement who posed a danger to him or the other officers. Although Officer Adams stated that he saw Taylor and Mahone go into the convenience store prior to the search, he did not further elucidate that he believed that they were in the basement when he entered the

[J-130A/B-1999]

convenience store[3] or that he had reason to believe that either Taylor or Mahone posed a danger to him. Given this testimony, I simply cannot agree with the opinion of judgment that Officer Adams conducted a constitutional protective sweep since the search was based on no more than the mere possibility that dangerous third parties may have been present in the basement. See Hayes, 106 Nev. At 551, 797 P.2d at 967.[4]

---

satisfy its burden of proving that the warrantless search of the basement was a legitimate protective sweep. See Buie, 494 U.S. at 327; Jeffers, 342 U.S. at 51.

[3] According to the record, Officer Adams immediately searched the basement upon entering the convenience store. There is no evidence that Officer Adams took note of the people present in the convenience store and determined that Taylor and Mahone were missing.

[4] Contrary to the opinion of judgment, I also believe that this case is distinguishable from Commonwealth v. Norris, 498 Pa. 308, 446 A.2d 246 (1982). In Norris, this Court upheld the police officers' sweep of the appellant's bedroom after the officers arrested appellant in his living room because the officers had "every reason to believe" that a firearm was available to the occupants of the apartment and that one of the usual occupants of the apartment, the appellant's brother, was unaccounted for. Id. at 315, 446 A.2d at 249; see also, Commonwealth v. Curry, 343 Pa. Super. 400, 494 A.2d 1146 (1985) (police properly conducted a

Therefore, since I believe that Commonwealth failed to present specific and articulable facts necessary to justify a protective sweep, I would reverse the Superior Court's order denying Appellants' motions to suppress the evidence obtained by the officers from the basement. See United States v. Akrawi, 920 F.2d 418, 420-421 (6th Cir. 1990) (protective sweep of second floor following arrest on first floor was unconstitutional where agents would not articulate a specific basis for fear that second floor harbored dangerous persons and agents encountered no violence or resistance in entering home).[5]

---

protective sweep of home because a dangerous shooting incident had just occurred and the gun was not yet accounted for). Here, neither Officer Adams nor Constable McIntyre testified that they recognized that Taylor and Mahone were unaccounted for when they entered the convenience store or that they had reason to believe that Taylor and Mahone possessed weapons or otherwise posed a threat to them.

[5] As I would hold that the officers were not justified in searching the basement, I would also necessarily hold that the officers improperly searched Taylor and the coats hanging in the basement. However, even if I believed that the officers were warranted in conducting a protective sweep of the basement, I disagree with the opinion of judgment that Officer Adams' seizure of the pill bottle from Taylor was constitutional. In my view, although Officer Adams may have had reasonable suspicion to frisk Taylor in order to insure that he was not armed, once Officer Adams patted Taylor's pocket and felt a cylinder object of approximately four inches in length and one and three-quarters in diameter, which he determined was neither a gun nor a knife, Officer Adams was not constitutionally justified in further searching Taylor's pocket and seizing the pill bottle. See Terry v. Ohio, 392 U.S. 1, 27 (1968); Commonwealth v. E.M., 588 Pa. 16, 26-28, 735 A.2d 659, 660-61 (1999).

I agree with the opinion of judgment that Constable McIntyre's search of the coats was not a proper search incident to arrest and thus, the Superior Court's order suppressing the evidence obtained from the coats should be reversed.

Mr. Chief Justice Flaherty and Mr. Justice Zappala join in the concurring and dissenting opinion.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	
Appellant	:	NO. 52
-v-	:	PITTSBURGH, 1997
ANTHONY TAYLOR	:	
- - - - - - - - - - - - - - - - - - -	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
Appellant	:	
-v-	:	
JOHN MAHONE, JR.,	:	NO. 53
	:	PITTSBURGH, 1997

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgement of the Court of Common Pleas of ALLEGENY County be, and the same is hereby REVERSED, CASE REMANDED, JURISDICTION RELINQUISHED.

BY THE COURT:

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: October 31, 1997

J. A35006/97

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ANTHONY TAYLOR, Appellee	:	NO. 00052 PGH 1997

Appeal from the Order dated December 18, 1996 in the Court of Common Pleas of Allegheny County, Criminal No. CC9502985

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN MAHONE, JR., Appellee	:	NO. 00053 PGH 1997

Appeal from the Order dated December 18, 1996 in the Court of Common Pleas of Allegheny County, Criminal No. CC9516023

BEFORE: POPOVICH, SAYLOR, AND OLSZEWSKI, JJ.

MEMORANDUM: FILED: October 31, 1997

This is a consolidated appeal by the Commonwealth from two suppression orders entered in the Court of Common Pleas of Allegheny County granting the motions of Appellees, Anthony Taylor and John Mahone, Jr., to

suppress narcotics which were seized from them during execution of a search warrant.[1] Because we conclude that the suppression court erred in granting Appellees' motions, we reverse its orders and remand the matter for trial.

The Duquesne Police Department, in response to numerous complaints about drug trafficking activity which was taking place at the G-Service Convenience Store at 418 Crawford Avenue in Duquesne, Pennsylvania, sent a surveillance officer to that location. On December 13, 1994, and January 4, 1995, the officer maintained surveillance for more than three hours and recorded his observations concerning the patrons who visited the establishment and the length of time that they were in the store. Based upon the number of people and the time that they spent in the store, the officer completed an affidavit of probable cause, and obtained a search warrant authorizing the police to search the following persons and premises for crack cocaine, drug paraphernalia, and proof of occupancy:[2]

> Person of Eric Gooden –B/M- Age 19-Dark Skinned
> 418 Crawford Ave(.) Duquesne (.) PA 15110—Corner of Crawford & 5th Street—2 story White Brick. A white sign is above the entrance labled (six) "G-Service Convenience Store (") & 2 phone numbers 466-1071 and 466-1061 painted in red (also a picture of a car on the sign) (.)

On January 20, 1995, a search team effectuated the search warrant. They entered the G-Service Convenience Store and searched it, finding Gooden and a significant quantity of crack cocaine behind the counter. One of the

---

[1] The Commonwealth has certified in its notice of appeal that the suppression orders effectively terminated or substantially handicapped its prosecution of the cases. See, Commonwealth v. Malinowski, 543 Pa. 350, 671 A.2d 674 (1996); Commonwealth v. Dugger, 506 Pa. 537, 486 A.2d 382 (1988);Pa. R.A.P. 311 (d).

[2] Prior to the issuance of the warrant, a controlled purchase of crack cocaine was made from the convenience store with the assistance of a confidential informant.

officers and the constable for the City of Duquesne were then directed to go down the steps into the basement of the building and continue the search. In the basement, they encountered Appellees, Anthony Taylor and John Mahone, Jr.. Taylor was seated in a barber's chair with a black plastic apron covering his torso and Mahone was cutting his hair. There was one other barber's chair in the basement, as well as all of the other equipment commonly found in a barbershop.

When the officer announced that they were police officers conducting a search for drugs, he noticed Taylor's hands moving underneath the plastic apron. Fearing that Taylor might be reaching for a weapon, the officer removed the apron and conducted a pat-down search of Taylor, at which time he felt a hard object in Taylor's pocket. Upon removing the object, the officer discovered it to be a plastic prescription bottle which appeared to contain crack cocaine. After searching and handcuffing Taylor, the officer decided to search and handcuff Mahone; however, nothing was found as a result of this search. The officer then instructed the constable to search two coats that belonged to Taylor and Mahone and were hanging on the coat rack in the basement. Additional pieces of crack were found in Taylor's coat and several baggies containing marijuana were found in Mahone's coat.

Taylor and Mahone were each subsequently charged with possession of a controlled substance and possession of a controlled substance with intent to deliver, and both filed motions to suppress the evidence seized from them. The suppression court granted these motions, finding that although the search warrant was valid, the searches of Taylor and Mahone exceeded the authority granted to the officers; accordingly, the evidence seized as a result of the searches was suppressed. The Commonwealth thereafter filed this timely appeal, in which it raises a single issue:

> Whether the trial court erred in suppressing evidence where the search of the basement was within the scope of the search warrant,

where Appellee Taylor's actions caused the officer to fear for his safety, and where the coats were capable of containing the type of contraband for which the police were searching?

"[W]hen reviewing the Commonwealth's appeal from the decision of a suppression court, we must consider 'only the evidence of the defendant's witnesses and so much of the evidence for the prosecution as read in the context of the record as a whole remains uncontradicted.'" Commonwealth v. Elliot, 416 Pa.Super. 499, 501, 611 A.2d 727, 728 (1992). Upon review, this court's responsibility is "to determine whether the record supports the factual findings of the court below and the legitimacy of the inferences and legal conclusions drawn from those findings." Commonwealth v. Elslager, 349 Pa.Super. 217, 224, 502 A.2d 1354, 1358 (1985).

In this case, the suppression court concluded that it was clear from the search warrant that the purpose of the search was to discover drug activity at the G-Service Convenience Store, and that accordingly, the premises to be searched were Gooden's business and his residence at 418 Crawford Avenue. The court further noted that "there was nothing in the warrant or affidavit of probable cause which would indicate that the barbershop's business was a source of drug activity." Opinion, Cashman, J., 2/6/97, p.5.

While we agree with the suppression court that because the activities occurring in the convenience store were the subject of the police investigation, the search of the barbershop was outside the scope of the warrant, we do not conclude that such search was without legal justification. Rather, having carefully reviewed the facts of record in this case, we conclude that under the surrounding circumstances, the search of the barbershop was conducted as part of a legitimate protective sweep of the premises in conjunction with the arrest of Gooden.

In Commonwealth v. Curry, 343 Pa.Super. 400, 404, 494 A.2d 1146, (1985), the Superior Court noted:

> The United States Supreme Court has recognized that there are "exigent circumstances" which justify a warrantless search incident to an arrest. The rationale underlying these exceptions to the warrant requirement is to ensure the safety of police officers and to prevent the destruction or removal of evidence. Chimel v. California, [395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)]; Coolidge v. New Hampshire, [403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)]; Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). In light of this rationale, the Pennsylvania Supreme Court has ruled that police may search the entire building incident to an arrest, for the purpose of seeking other people who may threaten the officer's well being, if the officers have reason to believe that others are present. Commonwealth v. Norris, 498 Pa. 308, 446 A.2d 246 (1982) . . . .

Here, it is unclear from the record whether there was a door which physically separated the first floor of the convenience store from the basement; however, it is undisputed that in order to enter the barbershop, one had to enter the convenience store and then descend a series of steps into the basement. Although there is no evidence which would indicate that the activity in the barbershop was being conducted in conjunction with the business of the convenience store, the record reveals that persons entering the building could pass freely between the store on the first floor and the barbershop in the basement; indeed, one had to enter the barbershop by walking through the convenience store. Thus, under these circumstances, the officers were justified in conducting a protective sweep of the basement of the building after they arrested Gooden on the first floor, since there was the possibility that there could be other

individuals on the premises who could threaten the officers' safety.

Furthermore, once the officers entered the basement, encountered Taylor and Mahone, and announced their purpose, they were justified in searching Taylor for a potential weapon. When Taylor observed the officers, he began moving his hands beneath the barber's apron in a manner which led one of the officers to suspect that he was reaching for a weapon. "It is beyond question that a police officer has a narrowly drawn authority to conduct a reasonable search for weapons, or a protective pat-down, where, as here, the officer reasonably believes that criminal activity is afoot, Commonwealth v. Canning, 402 Pa. Super. 438, 440, 587 A.2d 330, 331 (1991), and that the suspect may be armed and dangerous, Terry [v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L.Ed.2d 889 (1968)]." Commonwealth v. Stackfield, 438 Pa. Super. 88, 94, 651 A.2d 558, 560 (1994).

Upon feeling a hard object in Taylor's pocket, the officer was justified in searching the pocket to insure that no dangerous weapons were concealed therein. "'[U]nder the law of the Commonwealth, a more intrusive search of a suspect's person following a protective pat-down search would only be justified...where the officer reasonably believed he had felt what appeared to be a weapon.'" Stackfield, supra, 438 Pa. Super. At 96, 651 A.2d at 561, quoting In The Interest Of S.D., 429 Pa. Super. 576, 582, 633 A.2d 172, 175 (1993). Thus, the search of Taylor's pocket which revealed crack cocaine in a hard plastic prescription bottle was lawful.

Finally, the officers' search of the coats belonging to Taylor and Mahone was lawful, in light of the fact that the officers had just found contraband in Taylor's possession and could have reasonably believed the coats, which were located within ten feet of the two men, to be a common place where either contraband or weapons could be hidden. Accordingly, we perceive nothing unlawful in the officers' actions.

Because the officers' entry into the basement and the searches of the Appellees and their coats were lawfully conducted, the evidence seized as a result of the searched was admissible and should not have been suppressed. Accordingly, the orders of the suppression court are reversed, and the cases are remanded for trial.

Orders reversed; cases remanded; jurisdiction relinquished.

POPOVICH, J., files a Dissenting Statement.

OLSZEWSKI, J., files a Concurring Memorandum.

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
ANTHONY TAYLOR,	:	
Appellee	:	No. 00052 Pittsburgh 1997

Appeal from the ORDER Dated December 18, 1996, In the Court of Common Pleas of ALLEGHENY County, CRIMINAL, No. CC9502985

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
John Mahone, JR.,	:	
Appellee	:	No. 00053 Pittsburgh 1997

Appeal from the ORDER Dated December 18, 1996, In the Court of Common Pleas of ALLEGHENY County, CRIMINAL, No. CC9516023

BEFORE: POPOVICH, SAYLOR, and OLSZEWSKI, JJ.

CONCURRING MEMORANDUM BY OLSZEWSKI, J.:

I write separately because I respectfully disagree with my esteemed colleague's conclusion that the entry into the barbershop is covered by the protective sweep exception to the warrant requirement. Before officers may conduct a protective sweep, they must have reason to fear a threat to their well being. See Commonwealth v. Curry, 343 Pa. Super 400, 404, 494 A.2d 1146, 1148 (1985). Nothing in the findings of the suppression court indicates the officers had a reasonable fear of such a threat.

I note, however, that the barbershop in the basement of the G-Service Convenience Store was open to the public. The government's intrusion into the barbershop was, consequently, lawful because areas open to the general public can not support a reasonable expectation of privacy. See Commonwealth v. Gordon, 546 Pa. 65, 72-75, 683 A.2d 253, 257-57; Commonwealth v. Brundidge, 533 Pa. 167, 172-74, 620 A.2d 1115, 1118-19 (1993); Commonwealth v. Perdue, 387 Pa.Super. 473, 482-84, 564 A.2d 489, 494 (1989). Once the officers were in the barbershop, the movement of Taylor's hands under the apron provided reasonable and articulable suspicion for a pat-down search. See Commonwealth v. Lagana, 517 Pa. 473, 482-84, 537 A.2d 1351, 1354 (1988). The pat-down revealed a hard object. When considering the proximity of the cocaine found in the convenience store upstairs, the officers had probable cause to believe the hard object contained narcotics. The exigent circumstance arising from the potential for the destruction of evidence permitted the officers to conduct a warrantless search of Taylor's person. See Commonwealth v. Roland, 517 Pa. 371, 376-77, 637 A.2d 269, 270 (1994). The discovery of cocaine on Taylor provided probable cause to search the coats in the barbershop. Once again the warrant requirement was excused by exigent circumstances. Consequently, the officers complied with the requirements of both the 4th Amendment to the U.S. Constitution and Article 1, Section 8 of the Pennsylvania Constitution.

For the foregoing reasons, I concur.

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
ANTHONY TAYLOR,	:	
Appellee	:	No. 00052 Pittsburgh 1997

Appeal from the Order of the Court of Common Pleas of Allegheny County, Criminal Division at No. CC9502985

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
John Mahone, JR.,	:	
Appellee	:	No. 00053 Pittsburgh 1997

Appeal from the Order of the Court of Common Pleas of Allegheny County, Criminal Division at No. CC9516023

BEFORE: POPOVICH, SAYLOR, AND OLSZEWSKI, JJ.

DISSENTING STATEMENT BY POPOVICH, J.:

I respectfully dissent from the decision of the Majority. Rather, I would affirm based upon the reasoning of the court below.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

ANTHONY TAYLOR

vs.

JOHN MAHONE, JR.

CRIMINAL DIVISION
CC No. 9502985
Superior Court No. 00052PGH97
CC No. 9516023
Superior Court No. 00053PGH97

OPINION

JUDGE DAVID R. CASHMAN
533 Courthouse
436 Grant Street
Pittsburgh, PA 15219
(412) 350-3905

Copies sent to:

Michael Streily, Esquire
Office of the District Attorney
401 Courthouse
Pittsburgh, PA 15219

Leslie Perlow, Esquire
Office of the Public Defender

400 County Office
Building
Pittsburgh, PA 15219

Kathleen Cribbins,
Esquire
Suite 2000, 710 Fifth
Avenue
Pittsburgh, PA
Pittsburgh, PA 15219

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	) CC No. 9502985
vs.	) Superior Court No. 00052PGH97
ANTHONY TAYLOR	) CC No. 9516023
vs.	) Superior Court No. 00053PGH97
JOHN MAHONE, JR.	)

OPINION

The Commonwealth of Pennsylvania, (hereinafter referred to as "Commonwealth"), has filed the instant appeal as a result of this Court's Order Court granting the suppression motions filed by the defendants in these cases. In response to the notices of appeal, the Commonwealth was directed to file a statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) with respect to both cases. Complying with that directive the Commonwealth has raised one issue only with regard to this Court's suppression ruling, which issue is identical in both cases. The Commonwealth has contended that this Court erred in suppressing the evidence seized when the searches of the defendants and their property were not outside the scope of the search warrant. In order to understand this contention, a brief review of the facts giving rise to the issuance of the search warrant, and the subsequent searches made allegedly pursuant to it must be made.

The Duquesne Police Department had received numerous complaints about drug trafficking activity taking place at the G-Service Convenience Store located at 418 Crawford Avenue in Duquesne, Pennsylvania. In response to those complaints, the surveillance officer was sent to that

location to observe the activity at or near that store. On December 13, 1994 and January 4, 1995, that officer maintained surveillance of the store for more than three hours and recorded his observations concerning the patrons who visited this establishment and the length of time that they were in the store. Based upon the number of people and the time that they has spent in the store, an affidavit of probable cause was completed and submitted to the local district magistrate requesting that search warrants be issued for the G-Service Convenience Store and the residence of that store's proprietor, Eric Gooden, (hereinafter referred to as "Gooden").

On January 20, 1995, search warrants were obtained for these two locations and the police effectuated those searches. It is the search of the G-Service Convenience Store which is the subject of the current appeals. The arresting police officers went into the G-Service Convenience Store and searched the premises finding Gooden and a significant quantity of crack cocaine behind the counter. Having found this contraband, two of the members of the search team were directed to do down the steps of this building into another area and continue the search. In the basement of this building, a barbershop business was being conducted. That business had two barber chairs and all of the necessary equipment one would expect to find in a barbershop.

When the officers entered this barbershop, the observed Anthony Taylor (hereinafter referred to as "Taylor"), seated in a barber's chair with a black plastic apron covering his torso, getting a hair cut from John Mahone, Jr., (hereinafter referred to as "Mahone"). One of the officers, Richard Scott Adams announces that they were police officers conducting a search for drugs. Officer Adams testified that he observes Taylor's hands moving under the apron and he removed the apron and decided to search Taylor for a potential weapon. During his search he felt a hard object in Taylor's pocket which was subsequently removed and that object7, a plastic prescription bottle,

appeared to contain crack cocaine. Once Taylor was searched and handcuffed, Officer Adams decided to also search and to handcuff Mahone; nothing was found as a result of this search. Officer Adams then instructed a fellow officer to search the two coats that were hanging on the coat rack. These coats belonged to Mahone and Taylor and the searches of these coats revealed that Taylor had additional pieces of crack cocaine in his coat and Mahone has several baggies containing marijuana. The results of these searches, both upstairs and downstairs, provided the predicate for the criminal prosecutions filed against Mahone, Taylor and Gooden.

Counsel for the three defendants each filed an omnibus pre-trial motion alleging the invalidity of the search warrant and the subsequent searches. Following a pre-trial hearing on these motions, it was determined that while the search warrant was valid, the searches of Mahone and Taylor exceeded the authority given to these police officers and, accordingly, the evidence that was seized as a result of those searches was suppressed. The granting of these suppression motions substantially hampered or terminated the Commonwealth's ability to prosecute these defendants thereby enabling the Commonwealth to file the instant appeals. See ***Commonwealth v. Malinowski, Pa., 671 A.2d 770 (1996).***

The Commonwealth maintains that the search warrant that it received allowed police officers to search the entire property known as 410 Crawford Avenue, Duquesne, Pennsylvania. However, this current contention ignores the position that the Commonwealth took at the time of the suppression hearing when the validity of this warrant was first questioned. The Commonwealth maintained that the affidavit of probable cause attached to the warrant demonstrated the continuous patter of drug activity at the convenience store since that affidavit detailed the comings and goings of various individuals at the G-Service Convenience Store. Not only did the affidavit describe the gender, race and clothing of the individuals who went in and

out of the store but, also, it detailed the length of time that they stayed in the store. A review of this affidavit indicates that almost all of the individuals who were listed in the affidavit of probable cause, rarely stayed longer than two minutes in the G-Service Convenience Store and in most cases, not longer than a minute.

It is clear from reading both of the search warrants that were filed in these cases that the object of this investigation was Gooden and that it was Gooden's business and his residence that was sought to be searched. The affidavits contained in both search warrants contain the same introductory paragraph which identifies the scope of the search that was sought.

> On two different occasions, this officer (R. Scott Adams) was in a surveillance position located in the vicinity of S. 5th Street & Crawford Avenue, Duquesne, PA 15110. The reason for the surveillance; complaints of Drug-Trafficking at the G-Service Convenience Store located at this intersection. The proprietor of the Store is a Eric Gooden, AKA MeMe Crack. I have known Eric Gooden for at least 20 years. The surveillance dates were 12-13-94 and 1-4-95.

There was nothing in the warrant or the affidavit of probable cause which would indicate that the barbershop's business was a source of drug activity. Even the Commonwealth in its argument in response to the motion filed by Gooden in challenging the validity of the issuance of the warrant indicated that the search was to discover drug activity at the G-Service Convenience Store. The Commonwealth argued that the activity as cataloged by Officer Adams clearly indicated that individuals were going into this convenience store for the purpose of obtaining drugs and that the minimal time that they spent in the store obviously indicated drug activity was taking place. It would be difficult, if not

impossible, to imagine someone obtaining a hair cut within on to two minutes if one were to accept the Commonwealth's premise that the duration of time within the building pointed out drug activity. The warrant was for the convenience store and not a barbershop and it is the specificity of that warrant that mandated the suppression of the evidence seized from Mahone and Taylor.

> A search warrant directed against an apartment house, or other multiple-occupancy structure will be held invalid for lack of specificity if it fails to describe the particular room or subunit to be searched with sufficient definiteness to preclude a search of other units. *Commonwealth v. Carlisle*, 517 Pa. 36, 40, 534 A.2d 469, 471 (1987) (citations omitted). Where the description provided is precise enough to enable the officer to ascertain and identify, with reasonable effort, the place intended, and where probable cause exists to support the search of the area so designated, a warrant will not fail for lack of particularity. *In re Search Warrant B-21778*, 341 Pa. Super. 350, 359, 491 A.2d 851, 856 (1985). Moreover, a warrant directing a search of more than one living unit is valid only if there is probable cause that all are being used for the unlawful purposes involved. *Commonwealth v. Copertino*, 209 Pa. Super. 63, 224 A.2d 228 (1966). Finally, the reviewing court must make a practical, commonsense decision whether the place to be searched has been specified with sufficient particularity. *Carlisle, supra*, at 42, 534 A.2d at 472.

In Interest of Wilks, 418 Pa. Super. 73, 613 A.2d 572, 579 (1992).

While it was unclear as to whether or not there was a door which physically separated the first floor from the basement, it was clear that in order to enter this barbershop that one had to enter into the convenience store and then go down a series of steps to the basement barbershop. It was also clear that this barbershop was a separate and distinct facility from the convenience store. It had two barber chairs, it had the type of equipment that one would normally associate with a barbershop and, in fact, the activity that Officer Adams viewed as he entered the barbershop was a barber cutting a customer's hair. The searches of Taylor and Mahone obviously exceeded the scope of the warrant issued and, accordingly, the items that were seized as a result of these illegal searched had to be suppressed.

CASHMAN, J.

DATED: 2/5/97

Supreme Court, U.S.
FILED
OCT 1 2001
CLERK

No. 01-337

In The

Supreme Court of the United States

DAVID KNOX WILSON,

Petitioner,

v.

ATLAS WIRELINE SERVICE/CNA INSURANCE COMPANIES, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITON TO PETITION FOR WRIT OF CERTIORARI

THOMAS J. SMITH, ESQ.
Counsel of Record
KEVIN A. MARKS, ESQ.
GALLOWAY, JOHNSON, TOMPKINS, BURR & SMITH
701 Poydras Street, Suite 4040
New Orleans, Louisiana 70139
(504) 525-6802

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATEMENT OF QUESTION PRESENTED

Petitioner frames his statement of the question as follows:

> Does the "worsening" of a documented Permanent Total condition render the condition to be classified as Temporary and nullify the original onset of Permanency Status; therefore, denying the claimant annual cost of living increases in his compensation as required by Congress in 33 USC Chapter 18 Section 910(f)?

Throughout his Petition for Writ of Certiorari, however, Petitioner proceeds to ask this court to make several factual determinations including the date of his maximum medical improvement and the nature and extent of his disability. The above referenced statement is therefore not a statement of the question presented to this Court, but rather a confusing conclusion of law premised on several disputed assumptions of fact. Particularly, Petitioner's statement is based on three distinct factual assumptions: (1) that Petitioner is permanently and totally disabled; (2) that he has been since December 19, 1989; and (3) that his disability is exclusively attributable to his alleged lumbar injury. All three of these factual assumptions have been previously determined to the contrary by the Administrative Law Judge and affirmed by the Benefits Review Board. To the extent there was any ambiguity in the findings of the Administrative Law Judge, the United States Fifth Circuit Court of Appeals remanded the case for clarification. As such, Petitioner improperly asks this Court to make factual determinations that are expressly reserved for the Administrative Law Judge.

PARTIES TO PROCEEDING

David K. Wilson
P.O. Box 674
Ellisville, MS 39437

Hon. Chris J. Gleasman
U.S. Dept. of Labor
Employment Standards Administration
Room 13032
701 Loyola Avenue
New Orleans, LA 70113

Hon. Betty J. Hall
U.S. Dept. of Labor
Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

Hon. Carolyn D. King
Chief Judge
U.S. Court of Appeals
For the Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Hon. Lee J. Romero
Office of Administrative Law Judges
Heritage Plaza
111 Veterans Memorial Blvd., Suite 503
Metairie, LA 70005

Hon. Carole A. DeDeo
U.S. Dept. of Labor
Director, OWCP
Room S4325
200 Constitution Avenue N.W.
Washington, DC 20210

Hon. Charles Lee
U.S. Dept. of Labor
ESA/OWCP/LHWC
214 N. Hogan,
Suite 1040
Jacksonville, FL 32202

Hon. Augustus A. Simpson
Assoc. Chief Judge
Longshore Division
800 K Street, N.W.,
Suite 400-N
Washington, DC 20001

Hon. Robert H. Kravetz
Executive Director
U.S. Dept. of Labor
OAS
200 Constitution Ave. N.W., N-1651
Washington, DC 20210

TABLE OF CONTENTS

Page

Statement of Question Presented i

Parties to Proceeding ii

Table of Contents iii

Table of Authorities iv

Citation of Orders by Courts or Administrative Agencies 1

Statement of Jurisdiction 1

Statement of the Case 2

Summary of Argument 7

Argument and Authorities 9

Conclusion 17

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES:

Metropolitan Stevedore Company v. Rambo, 521 U.S. 121, 117 S.Ct. 1953, 138 L.Ed. 2d 327 (U.S. 1997) 9

FEDERAL COURT CASES:

Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039, 26 BRBS 30 (5th Cir. 1992), *affirmed*, 27 BRBS 192 (1993) 14

New Orleans (Gulf Wide) Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981) 14

BENEFITS REVIEW BOARD CASES:

Dixon v. John J. McMullen & Associates, 19 BRBS 243 (1986) 11

Dorsey v. Cooper Stevedoring Co., 18 BRBS 25 (1986) 11

Elliott v. CMP Tel. Co., 16 BRBS 89 (1984) 12

Jenkins v. Kaiser Aluminum & Chemical Sales, 17 BRBS 183 (1985) 16

Mason v. Bender Welding & Machine Co., 16 BRBS 307 (1984) 11

P&M Crane Company v. Hayes, 930 F.2d 424 (5th Cir. 1991) 14

Rinaldi v. General Dynamics Corporation, 25 BRBS 128 (1991) 13

TABLE OF AUTHORITIES – Continued

Page

Stoute v. Shea-Ball, 13 BRBS 755 (1981) 11

Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56 (1980) 12

STATUTES

33 U.S.C. § 901, *et seq.* 7

CITATIONS OF ORDERS BY COURTS OR ADMINISTRATIVE AGENCIES

The Opinion from which Petitioner seeks certiorari is an unpublished opinion of the United States Fifth Circuit Court of Appeals filed on June 1, 2001.

The Opinion is reproduced in Petitioner's Appendix to his Petition for Writ of Certiorari

No. 00-60511
David K. Wilson, Petitioner
Versus
Atlas Wireline Service/CNA Insurance Companies; Director, Office of Worker's Compensation Programs, U.S. Dept. of Labor.

Benefits Review Board Case Number 99-0607

The Opinion is reproduced in Petitioner's Appendix to his Petition for Writ of Certiorari

---

STATEMENT OF JURISDICTION

This Honorable Court should decline the exercise of its supervisory jurisdiction as Petitioner has failed to cite any compelling reasons for doing so as required by Rule 5 of the Rules of the Supreme Court of the United States. Rule 5 also mandates that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The United States Court of Appeals for the Fifth Circuit properly remanded this case to the Administrative Law Judge for a factual determination consistent

with its opinion. Petitioner now asks this Court to make those same factual determinations that the Court of Appeals determined should be left to the Administrative Law Judge. Neither the interpretation nor application of the federal statutes cited by Petitioner are at issue.

STATEMENT OF THE CASE

On December 27, 1988, Wilson allegedly injured his back when he slipped and fell while working on a fixed platform oilrig. He remained on the rig until the next crew boat arrived, at which time he reported the accident. Employer, Atlas Wireline Services, and Carrier, CNA Insurance Companies, Respondents in the instant action, authorized initial medical care consisting of conservative treatment. (Trial Transcript hereinafter "Tr." at pp. 50-53.) On February 9, 1989, Petitioner's choice of neurosurgeon, Dr. Michael Lowry, performed a lumbar hemilaminectomy and diskectomy. The surgery allegedly provided Petitioner immediate relief, but his pain returned and continued over the next several months. After an MRI revealed no evidence of a disc herniation, Dr. Lowry prescribed a TENS unit, which Petitioner alleged helped his back symptoms. (Employer's Trial Exhibits Nos. 6 and 26.)

Dr. Lowry continued to treat Petitioner for the next several years, and after repeated MRIs indicated no significant changes, the physician ordered a myleogram and CT scan. Those diagnostic tests were performed and revealed degenerative changes at L4-L5 and L5-S1, and mild disc bulges at L5-S1. On June 11, 1996, Dr. Lowry

placed a spinal cord stimulator on Wilson's lumbar spine. However, as it did not improve Wilson's condition, Dr. Lowry removed it on June 16, 1996.

On October 10, 1996, Petitioner was implanted with a morphine pump. Wilson responded well to the morphine pump and Dr. Lowry opined Petitioner reached maximum medical improvement ("MMI") on May 19, 1997, given the stability of Wilson's condition from November 1996 through May 1997. (Employer's Trial Exhibits Nos. 6 and 26.) Dr. Lowry opined that Petitioner experienced an increased tolerance of activity after the pump was implanted. He testified that, based upon a reasonable medical probability, Wilson would not be able to return to his previous line of work in the oil field. He testified that Petitioner would be capable of sedentary work with frequent breaks, and imposed lifting restrictions of no more than twenty-five pounds occasionally and under ten pounds repetitively. (Employer's Trial Exhibits Nos. 6 and 26.)

Dr. Lowry also referred Petitioner to Dr. David L. McKellar, a neurologist, who opined that the morphine pump should be the last option for Petitioner given his relatively young age. Petitioner was also seen by Dr. Wendell Helveston, a neurologist, who believed Wilson was vague in describing the nature and localization of his pain. Dr. Helveston opined that the claimant's pain was musculoskeletal rather than radicular, and noted that his complaints about sensory loss were inconsistent with his physiology. Dr. Helveston concurred with Dr. Lowry regarding maximum medical improvement, and recommended a functional capacity examination. Dr. Helveston

also placed lifting restrictions of no more than twenty-five pounds. (Employer's Trial Exhibits Nos. 2 and 27.)

Wilson was also seen by three health care providers with respect to his alleged psychological/psychiatric injuries. He was referred by Dr. Lowry to Ms. Linda Thoms, a licensed social worker. Ms. Thoms has provided therapy sessions to Petitioner from December 1997 through the present. Ms. Thoms diagnosed Petitioner with depression secondary to chronic pain. Thoms stated that Wilson's anger, depression, and sense of loss were so severe that they would prevent him from having any meaningful interaction with other persons in a work environment. She further diagnosed him with post-traumatic stress disorder, and testified that Wilson reported auditory hallucinations. Under cross-examination, Ms. Thoms conceded that Wilson possessed at least average intelligence, and that he understood that his statements to her regarding his psychiatric condition would later be used in support of his contentions of disability. (Claimant's Trial Exhibit No. 23.)

Petitioner has also been seen by Dr. Steven Kamp, a psychiatrist to whom Wilson was referred by Ms. Thoms and Dr. Lowry. Dr. Kamp also diagnosed Wilson with major depression with psychotic features, and opined his condition resulted from his work accident of December 1988. Dr. Kamp opined that Petitioner was then not capable of working in any capacity because of the degree of his symptomatology. However, Dr. Kamp conceded on a cross-examination that Petitioner was not permanently

disabled from his psychiatric illness. He stated that Petitioner was improving as a result of his psychiatric treatment, and that this treatment should continue to help him improve. (Claimant's Trial Exhibit No. 22.)

Wilson was also seen by Dr. Henry A. Maggio, a psychiatrist retained by the Employer and Carrier. Dr. Maggio diagnosed Wilson with moderate major depressive disorder without psychosis. Dr. Maggio further stated there was a history of alcohol and pain medicine abuse, and opined that Wilson suffered from a personality disorder with features of paranoia, dependency and obsessive/compulsive behavior. He further diagnosed Wilson with a pain disorder associated with both psychological and general medical factors. Dr. Maggio disagreed with the implantation of the morphine pump as it would cause dependency on medication.

Dr. Maggio testified that the Petitioner's traits did not preclude him from being gainfully employed, although due to the current nature of his depression he was unable to return to immediate employment. Dr. Maggio opined that with continued medical treatment and psychotherapy, Petitioner would eventually be able to find employment. He did not believe that Wilson needed in-patient treatment, and specifically disagreed with the diagnosis of post-traumatic stress disorder. Dr. Maggio agreed with the statements of Dr. Kamp and Ms. Thoms that employment can be therapeutic, and specifically stated that in Wilson's case it would be in his best interest. (Claimant's Trial Exhibit No. 20 and Employer's Trial Exhibit No. 7.)

The deposition testimony of Timothy E. Crabtree, a licensed private investigator, was also admitted into the trial record, as were surveillance videotapes taken by Mr. Crabtree. That surveillance took place in October 1995, March 1997, and March 1998. The 1995 and 1998 surveillance videos showed Wilson performing errands, walking up and down steps without a limp, driving, and climbing in and out of his vehicle without any apparent difficulty. The 1997 surveillance displayed Wilson performing construction on a garage adjacent to his home. Petitioner is shown repeatedly bending over, carrying tools, climbing a ladder, reaching above his head to hammer and drill. He was also shown repeatedly carrying lumber and a ladder. At no time did Petitioner appear to be in pain or having any physical difficulty in movement or performance of the tasks at hand.

In his "Statement of the Case" Petitioner contends that his benefits were terminated in 1997 because he would not agree to settle his claim. However, the evidence clearly establishes that Employer and Carrier actually terminated Petitioner's benefits following surveillance that revealed Wilson's true physical capabilities. It was not until Wilson was aware he had been surveilled, and his benefits had been terminated, that he made any claim for psychological or psychiatric injury.

Petitioner contended before the trial court and each appellate court, respectively, that his date of MMI was December 19, 1989; that his condition was permanent since that date; and that such permanent and total disability was the result of his physical condition alone. The trial court found to the contrary and both appellate courts affirmed. To the extent there was any ambiguity in the

totality or permanency of Petitioner's physical condition, the Fifth Circuit properly remanded the case to the Administrative Law Judge.

SUMMARY OF ARGUMENT

This case concerns the nature and extent of Petitioner David Wilson's disability and his entitlement to workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. 901 *et seq*. In the proceedings below, Petitioner claimed disability by virtue of a lumbar injury and a psychiatric condition. In the instant Writ Application, Petitioner seeks permanent and total disability for his lumbar injury alone. Administrative Law Judge ("ALJ") Lee J. Romero, Jr. concluded that Petitioner reached maximum medical improvement with respect to his lumbar injuries on May 19, 1997 but remained temporarily totally disabled with respect to his psychiatric condition. Despite cross appeals to the Benefits Review Board ("BRB"), that administrative body affirmed *en toto* the decision of the ALJ. Petitioner then sought review by the United States Fifth Circuit Court of Appeals and Respondents, Atlas Wireline Services and CNA Insurance Companies (Wilson's employer and its insurance carrier), accepted the findings of the two lower administrative courts.

The Fifth Circuit flatly rejected Wilson's argument that he was entitled to Permanent Total disability benefits from 1989 based on his back injury alone and remanded the case to the Administrative Law Judge for clarification. Specifically, the Court remanded for clarification of

whether Wilson was totally disabled from a combination of both his back injury and his alleged psychological impairments. Presently, Petitioner asks this Court to make the very factual determinations made at the trial level and which the Fifth Circuit has either affirmed or remanded to the ALJ for clarification.

Respondents submit that the ALJ and BRB properly determined the date of maximum medical improvement ("MMI"). The ALJ and BRB properly rejected Petitioner's contentions of permanent and total disability, an earlier date of MMI, and sheltered employment. The evidence supporting the ALJ and BRB decisions was substantial. The lower courts' decisions were grounded in fact and law and should not be disturbed on appeal. To the extent there was any ambiguity in the ALJ's findings, the case has been remanded for clarification by the Fifth Circuit.

Respondents do not dispute the ALJ's findings of permanency regarding Petitioner's back condition. However, Petitioner's contention that such a finding entitles him to an award of permanent and total disability must be rejected. While the ALJ found no suitable alternative employment for Wilson, that decision was based upon a combination of both physical and psychological factors that resulted in temporary total disability. The medical and vocational evidence established that, with treatment, Wilson's mental condition can be resolved, after which Petitioner will be able to obtain gainful employment. To the extent this Court has a question as to the ALJ's finding with respect to the nature and extent to

Petitioner's disabilities, it should allow the matter to be remanded for clarification as ordered by the Fifth Circuit.

ARGUMENT AND AUTHORITIES

Petitioner's statement of the question presented to this Court actually presents several factual issues for the Court's consideration, none of which is properly before this court. Petitioner ultimately asks this Court to make the factual determination that the Fifth Circuit Court of Appeals remanded to the ALJ for clarification. The Administrative Law Judge ("ALJ") is the proper fact finder in LHWCA cases, and an appellate court should not substitute its own factual determinations when the ALJ's are based upon substantial evidence. *Metropolitan Stevedore Company v. Rambo*, 521 U.S. 121, 140; 117 S.Ct. 1953, 1964; 138 L.Ed. 2d 327 (U.S. 1997). Any questions of fact left unclear should be remanded to the ALJ. *Id.* As a factual matter, Petitioner's physical condition as it relates to his lumbar spine has not been determined to be permanent and total. As such, the rule of law expounded by Petitioner in his "Statement of Question Presented" and throughout his Petition has no application. It is for the trial court to determine factual matters such as the nature and extent of a claimant's disability and maximum medical improvement. The Fifth Circuit understood this and properly remanded the case for clarification. Therefore, this Court need not consider Petitioner's Writ Application. Nevertheless, Respondents now address each of Petitioner's factual contentions separately.

The Date of Maximum Medical Improvement with Respect to Petitioner's Lumbar Injury was May 19, 1997.

Wilson contends that the proper date of maximum medical improvement (hereinafter "MMI") was actually December 19, 1989. Admittedly, Dr. Lowry initially placed this date (and then a date in 1990) for MMI after Wilson's first surgery. Shortly thereafter, Wilson was capable and did return to the work force as an automotive parts sales person. However, Wilson's complaints continued and increased to the point that he was placed back on temporary total disability, and underwent additional significant treatment over the next several years with Dr. Lowry. This included additional surgical procedures, the implantation of a spinal cord stimulator, and a morphine pump. Dr. Lowry testified very clearly that MMI was obtained on May 19, 1997, because following the insertion of the morphine pump, Petitioner's condition had remained stable enough to reach MMI. (Employer's Trial Exhibit No. 26, p. 30).

Petitioner's argument with respect to maximum medical improvement is misguided. Petitioner argues that a report issued by Dr. Lowry in 1989 is controlling even though that same physician changed the date of MMI several times and ultimately designated May 19, 1997 as the proper date of MMI. No physician including Dr. Lowry disputes that May 19, 1997 is the proper date of MMI with respect to Petitioner's lumbar condition.

In judicially determining May 19, 1997 as the date of MMI, the ALJ considered not only the testimony of Dr. Lowry but also the medical records and testimony of all other treating physicians, as well as Petitioner's own

testimony regarding his condition. The ALJ specifically noted that no other physician contested Dr. Lowry's opinions, and that, in fact, there was no dispute among any of the physicians regarding Petitioner's physical injury. The ALJ examined this issue twice (once in his initial opinion and later upon a motion to reconsider) and both the ALJ and BRB found the medical evidence clear as to a May 19, 1997 date of MMI. This finding is supported by substantial evidence and cannot be overturned based on a single medical report when that medical report was, in fact, in evidence and considered by the fact finder.

The date on which an injured worker's condition becomes permanent is primarily a medical determination. Thus, medical evidence must establish the date on which the Petitioner has received the maximum benefit of medical treatment such that his condition will not improve. *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984). A judge should rely on the medical evidence and physicians' opinions regarding permanency in establishing a date of MMI. *Dixon v. John J. McMullen & Associates*, 19 BRBS 243 (1986). Where the medical evidence indicates that the injured worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Id.* Similarly, where the treating physician has opined that surgery is necessary in the future and that an injured worker should be re-evaluated in several months to check for improvement, it is reasonable for an ALJ to conclude that a claimant's condition is temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986); *Stoute v. Shea-Ball*, 13 BRBS 755 (1981).

In the instant case, the record is replete with medical evidence suggesting that Dr. Lowry's 1989 and 1990 assessments of MMI were premature. When a claimant's condition deteriorates, then the initial MMI date is not controlling. *Elliott v. CMP Tel. Co.*, 16 BRBS 89 (1984). It is well documented that additional treatment and surgeries were at first recommended, then implemented over the course of eight years. Despite Petitioner's allegations of a "worsening" of his condition, the testimony of Dr. Lowry established that treatment and surgeries over that eight year span caused marked improvement in Wilson's condition, to the point where he stabilized in 1997. Accordingly, the ALJ's decision establishing maximum medical improvement on May 19, 1997 is eminently reasonable, and the Benefits Review Board was correct in accepting it. The Fifth Circuit Court of Appeals found that substantial evidence supported a finding that Petitioner reached MMI with respect to his alleged back injury in May of 1997. Accordingly, this Court need not disturb this finding.

The Administrative Law Judge did not Adjudicate Petitioner Totally Disabled with Respect to Petitioner's Lumbar Injury.

The burden of proving the nature and extent of disability rests with a claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). While Respondents do not dispute that Petitioner suffered some level of disability as a result of his work-related accident, the record of the ALJ's proceedings cannot support any finding of permanent and total disability. Disability is an economic concept based upon medical foundation.

Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

In the instant matter, the trial court properly concluded that Petitioner reached maximum medical improvement on May 19, 1997 based upon the testimony of his treating neurosurgeon, Dr. Michael Lowry. However, even Dr. Lowry conceded that Petitioner would be capable of a sedentary type of work provided it were within lifting restrictions of no more than 25 pounds occasionally and 10 pounds repetitively. (Employer's Trial Exhibit 26 pp. 35-36.) Dr. Wendell Helveston also opined that Wilson did not need any further neurosurgical treatment. Dr. Helveston testified that Petitioner could also return to some sort of employment within the physical restrictions of not lifting greater than 25 pounds. (Employer's Trial Exhibit Nos. 2 and 27.)

More telling than any physician's opinions regarding Wilson's limitations was the conduct that the ALJ observed in surveillance videos of Petitioner. Despite Wilson's self-serving complaints of pain to the trier-of-fact and to his health care providers (who conceded Wilson was intelligent enough to understand the concept of secondary gain), surveillance established Wilson performing heavy manual labor. In addition to displaying Wilson's ability to drive a vehicle, enter and exit a vehicle and ambulate free of any discernable limitations, video evidence established Wilson engaging in construction activities. These included carrying lumber and various tools, including a circular saw and a 12-foot ladder. Wilson was observed climbing up and down a ladder on

multiple occasions, hammering over his head, and repeatedly bending at the back and knees while he performed general carpentry.

Although the ALJ blithely stated he found the surveillance videos unpersuasive as they failed to establish that Petitioner was not "suffering pain", Petitioner's "pain" clearly was not a contraindication to strenuous physical labor. Wilson admitted he was not in so much pain as to seek immediate medical attention following this activity. Taken as a whole, Respondents submit that the surveillance clearly established a wage earning capacity on behalf of Wilson.

While the Employer and Carrier have the burden of establishing suitable alternative employment, they are not required to find specific jobs for Petitioner; instead, they need only demonstrate the availability of general job openings in certain fields in the surrounding community. *New Orleans (Gulf wide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *P&M Crane Company v. Hayes*, 930 F.2d 424 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (5th Cir. 1992), *affirmed*, 27 BRBS 192 (1993).

Respondents' vocational rehabilitation expert, Dr. Larry Stokes, testified that, although Wilson was incapable of heavy manual labor per his physician's restrictions, he had several skills which were transferable to other occupations. Overall, Dr. Stokes opined that Wilson had an above-average aptitude and ability to learn new tasks. (Employer's Trial Exhibit 30, pp. 18-20.)

Even Donald Carlisle, Wilson's vocational expert, conceded that if Wilson's psychological conditions

improved, he would be able to work in a sedentary/light position. (Employer's Trial Exhibit No. 16, p. 4.)

The best evidence of these better-than-average intellectual skills is contained in the research, writing, and arguments Petitioner has made in relation to the instant litigation. Although he is mistaken on the application of the law, Petitioner has clearly demonstrated an above-average intellect and ability to perform sedentary work. Respondents respectfully suggest Wilson's efforts before this Court, the BRB and the Fifth Circuit belie any assertions that he is incapable of performing any type of employment.

Every time the ALJ examined an employment opportunity for the Petitioner, he found the employment opportunity was unsuitable based at least in part to Petitioner's mental condition. While the ALJ did make a reference to Petitioner's entitlement to "permanent total disability," that reference should not be read out of context or otherwise misconstrued. The entire discussion preceding that finding considered the mental and physical disabilities in concert. Any finding of total disability contemplated both mental and physical disabilities. The record is replete with evidence that improvement in the Petitioner's psychological condition would allow him to obtain some form of employment and thus change his status from temporary total disability to permanent partial disability.

While Wilson admittedly remains temporarily totally disabled with respect to his psychological injuries, the ALJ clearly did not intend that Wilson was totally disabled with respect to his lumbar injury. The ALJ made no finding as to suitable alternative employment exclusive to

Wilson's back injury. Petitioner's orthopedic limitations are, in fact, not totally disabling. It follows that Petitioner's contentions of permanent and total disability must be rejected.

Petitioner is not permanently disabled as a result of his alleged psychological problems. This is supported by the testimony of his own treating psychological/psychiatric health care providers. The testimony of Ms. Linda Thoms, Petitioner's social worker/therapist, established that her treatment is ongoing. From a psychological standpoint, Thoms stated that Wilson has not yet reached maximum medical improvement. (Claimant's Trial Exhibit 23, pp. 57-58.) Dr. Peter Kamp, Wilson's treating psychiatrist, also opined that Petitioner is not presently permanently disabled from a psychiatric illness, and stated further that his treatment should continue to help him improve. (Claimant's Trial Exhibit 22, p. 50.) Dr. Henry Maggio, Employer's psychiatrist, agreed with Thoms and Kamp's assessments, and opined that with continued medication and psychotherapy, Wilson would continue to receive a positive benefit and would eventually be able to find employment. (Claimant's Trial Exhibit 20, pp. 28-31.)

Before an injured worker's condition can be found to be permanent, both physical and mental factors must be considered. When a claimant suffers both physical and emotional trauma and needs both physical and psychological treatment before he can return to work, he is not yet at the point of maximum medical improvement and should still be considered temporarily disabled due to the psychological effects of his injury. See *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183 (1985).

Petitioner's arguments to the contrary notwithstanding, the record clearly establishes that Wilson's psychological treatment is still providing benefit and improvement to his mental condition. Furthermore, with respect to Wilson's psychological condition, the BRB specifically recognized that Ms. Thoms' opinion was uncontradicted in that Petitioner requires continuing treatment and that his condition has not reached maximum medical improvement. Accordingly, Wilson has not yet reached MMI with respect to the mental disability, and the BRB correctly found the ALJ to have properly adjudicated him temporarily totally disabled based upon competent medical evidence. To the extent there was any ambiguity in the pronouncement of the ALJ's factual findings, the Fifth Circuit properly remanded for clarification.

CONCLUSION

The ALJ never made any finding that Wilson is permanently and totally disabled by virtue of his lumbar injuries alone. The evidence clearly established that but for Wilson's psychological condition, for which he remains temporarily totally disabled, suitable alternative employment existed within the limitations set forth by the treating and evaluating physicians.

To the extent the ALJ's factual determinations were ambiguous, the case was properly remanded for clarification by the Fifth Circuit Court of Appeals. The only issues presented to this Honorable Court are factual determinations which are properly left to the ALJ. Respondents

therefore respectfully submit that there is no basis for this Court to grant Certiorari.

Respectfully submitted,

THOMAS J. SMITH, ESQ.
Counsel of Record
KEVIN A. MARKS, ESQ.
GALLOWAY, JOHNSON, TOMPKINS,
BURR & SMITH
One Shell Square
701 Poydras Street, Suite 4040
New Orleans, Louisiana 70139
Telephone: (504) 525-6802
Attorneys for Employer
and Carrier